Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

NO. 80-1140

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

MARK J. THOMAS
~~BETRA MANUFACTURING COMPANY~~
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK J. THOMAS.
REPRESENTING SELF, OWNER

BETRA MANUFACTURING COMPANY
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QUESTIONS PRESENTED

What is the value of the due process clause of the United States Constitution, Fifth Amendment guaranteeing a fair trial? Is due process denied if the judges of a Federal Appellate Court disregard the ethical principles behind the American Bar Association Canons of Judicial Conduct for Federal Judges by not taking appropriate action against a federal agency admitting in oral hearing before the Appeals Court their prosecution of the respondent was based on a fraudulent document submitted by the charging party?

Is a fair trial not further denied if the Administrative Law Judge made pretrial ex parte communication with the agency, denied my witnesses, and acted as an advocate of the agency during the trial; the N.L.R.B. Board condoning this action by stating no injustice was done?

What is the value of a Constitutional clause that dictates fairness in a court of law if not one of the twenty-plus judges of the Ninth Circuit Court of Appeal when presented with our Petition for Rehearing outlining gross improprieties does not feel the ethics of his profession strongly enough to request a vote on the suggestion for a rehearing en banc?

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AUTHORITIES

Cases

NLRB v. Herman Sausage Inc., 275 F2d 229 (5th Cir. 1960) p. 17

Universal Camera Corp. v. NLRB 340 U.S. 474 (1951) p. 19

NLRB v. Vantram Electronics Corp., 580 F2d 921 (1978) 7th Cir. p. 19

NLRB v. Yama Woodcraft Inc., 580 F2d 942 9th Cir. (1978) p. 19

Golden State Bottling Co., v. NLRB 414 U.S. 168 (1973) 9th Cir. p. 18

CONSTITUTION

U.S. Constitution, 5th Amendment, p. 3

STATUTES

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. at 395 29 U.S.C.), Sec. 7, Sec. 8a (1) (5) p. 3, 4.

U.S. Code Title 18, Sec. 1001, p. 9

MISCELLANEOUS

American Bar Association's Code of Judicial Conduct for United States Judges. (in Question)

Ref: Legal Ethics, Wise, Raymond L., 1979 Matthew Bender, Publisher

JUDGMENTS BELOW

ORDER Filed September 15, 1980, U.S. Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Suggestion that Hearing be en Banc. Not reported

MEMORANDUM Filed July 21, 1980 U.S. Court of Appeals for the Ninth Circuit On Application for Enforcement of an Order of the N.L.R.B., "Enforcement of the Board's order is GRANTED," Not reported.

DECISION of the N.L.R.B. Dated December 13, 1977. Cited: Betra Mfg. Co. and International Association of Machinists and Aerospace Workers, AFL - CIO, District Lodge 93, Local Lodge 504 1978 NLRB, 18, 828, 233 NLRB No. 156 Case # 32-CA-64, December 13, 1977

JURISDICTIONAL STATEMENT

Jurisdiction of this court is conferred by U.S.C. 28-1254 "Cases in the Court of Appeals may be received by the Supreme Court by the following methods:

1. By Writ of Certiorari granted upon petition of any party to a civil or criminal case, before or after rendition of judgment.
2. The date of filing of the order to be reviewed is September 15, 1980. This is the order denying Petition for Rehearing and Suggestion that Rehearing be en Banc, U.S. Court of Appeals for the Ninth Circuit.

PROVISIONS OF LAWS INVOLVED IN THE CASE

U.S. Constitution, Fifth Amendment:

Criminal Proceedings and Condemnation of Property

(Section 1.) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C.)

(Section 7). Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor

organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer---

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT OF THE CASE

The power of the Federal Government over the every day lives of the citizen has become so great in the last few decades that the possibility of being brought to answer by the Government for an infraction of some regulation or law is great. Whereas fifty years ago the possibility of a citizen being called to answer by the "feds" was minimal.

In this case the National Labor Relations Board has exercised their power over the small employer of five to ten employees. We are a local machine shop and foundry operated by the proprietor Mark J. Thomas. This case arose when the employees of the company elected a union to represent them in collective bargaining with the owner. We bargained with the Union for six months. During thus time we offered the union a signed contract

to accept. We had bargained in good faith without deceit, but bargained hard for a contract that we felt just to all. But since this contract did not meet the Union criteria (which seemed to have nothing to do with the employees' opinions of the matter) the Union, instead of exercising the right to strike, thereby bringing pressure on the employer to make a better offer, chose to take another course. They chose to file with the N.L.R.B. Region 20 (which has a reputation for being pro-union) a charge against the employer saying that:

> "Since on or about January 19 1976, the above mentioned Employer, by its officers and agents, by intimidation, threats, espionage, et cetera, and by other acts and conduct, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.
>
> On or about January 19, 1976 the above-named Employer, by its officers and agents, refused and continues to refuse to bargain collectively with the authorized

> agents (representatives) of International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 93, Local Lodge No. 504, a labor organization chosen by a majority of its employees at its premises at 50 Bellevue Avenue, San Jose, California, for collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment."

This charge was signed by an officer of the Union and attested to be true. (Volume 1 of Record, page 3). The N.L.R.B. investigated this charge and had the Union file an amended charge to support some of their findings that the pro-union Regional Officer of the Board thought could be made in a case against us. That is to say the Board's representative was not impartial in the investigation but was looking beyond the original charge of the Union. From the beginning we informed the agency investigator of the falsity of the charge and always argued this point in our answers to the subsequent complaint, amended complaint,

administrative hearing and cross examination of the Government witnesses as to the truth or falsity of the charge.

We continued to argue this in our End of Trial Brief, Exceptions to the Board and Its Supporting Brief. Again we brought out this false charge in our appellate brief and oral hearing before the appellate court. As outlined in our Petition for Rehearing, the N.L.R.B. attorney, after returning to the rostrum at the oral hearing to present his closing remarks stated "The Union was the party that refused to bargain at the January 19 meeting." Here we have an admission that the whole proceeding had been based on a charge made by the Union in a fraudulent document filed with the Regional N.L.R.B. office. Knowing the Union affidavit was false, the N.L.R.B. proceeded in the overzealous attempt to let the Union enjoy "the fruits of

bargaining." They decided to go ahead with prosecution in support of the Union. The proper proceeding of the Board, when they found out that the original charge was false, would have been to act as stated at the bottom of the Charge Against the Employer, form N.L.R.B. - 501. They should have instituted proceedings with the Justice Department to bring charges for wilful false statement under U.S. Code Title 18, Sec. 1001.

Where is equity and justice in this case if the Government is allowed to approach the bar with unclean hands?

This was only the start of harrassment by the N.L.R.B. To save the Court reading time, we will simply list the abuses of truth, fairness, misinterpretation of statutes, false listing of citations, etc. that transpired in this case. They are basically in chronological order:

1. At a meeting with the Regional General Counsel, I was informed that the charges had merit and they would proceed with a complaint unless:

   1.a The Regional General Counsel threatened me with "years of labor unrest" if I did not enter into a settlement agreement.

2. After signing the Settlement Agreement, the Regional Compliance Officer tried to impose on me greater burdens than agreed to.

3. The Compliance Officer quoted me law so as to deprive me of an important right in the bargaining process.

4. Later on I found the Union had been quoted the statute in full, giving them notice of the right

that bargaining parties were not required to make concessions.

5. The Compliance Officer, by her reporting requirement in excess of the Settlement Agreement injected herself into the bargaining process.
6. She redressed me in a letter for not capitulating to her excess reporting requirement and sent a copy to the Union which they used against me in front of the employees.
7. The Compliance Officer, in her communications tried to dictate the course of bargaining clauses to the Union's benefit.
8. The employees, after the certification year had expired, petitioned the Regional Director for a decertification election.

9. They were turned down because of the Settlement Agreement, which was between me and the Union and should not have affected their rights under the statute. The N.L.R.B. boldly points out in the beginning of all the N.L.R.B. NOTICES that they will do nothing to interfere with the employees' rights.

10. Our employees appealed the Regional Director's decision. The Board replied by saying that "insufficient grounds have been alleged" to grant them these rights. (These rights of employees are, of course, the whole purpose of the Act.

11. We complained to the President, Senators, etc. concerning these abuses by the Compliance Officer

and the Regional Director. The letter to the President was forwarded to the Board to investigate the matter. They whitewashed it over with the excuse that these errors were unintentional. We were later supplied with proof that the misleading quote was deliberate.

12. Many false statements were made in the complaints issued.
13. A misleading letter was given to me to get me to sign a formal settlement agreement.
14. The A.L.J. made ex parte communication with the compliance officer before the trial.
15. The A.L.J. denied me witnesses over my objection.
16. He seemed to be in a hurry to end the trial that night, justice be damned.

17. The A.L.J. acted as an advocate for the N.L.R.B. when he asked the Board attorney what remedy he was going to ask for and then suggested a severe one.

18. He also acted as an advocate when he extracted from the evidence matter that was damaging to me but about which no charge was filed as the Union had agreed to the granting of a wage increase at the start of the bargaining sessions.

19. The Board's attorney allowed his witness to perjure himself on the stand in relation tothe original charge.

20. The Union's agent perjured himself in cross-examination concerning the January 19 meeting.

21. The Board's attorney had his witness quote things out of

context so as to give different meaning to my statements.

22. He also quoted these statements out of context in his close of trial brief.

23. The Board's briefs and pleading are FULL OF CASES QUOTED so as to construe meaning favorable to their cause.

24. The Board, in their findings concurred in all these deceitful tactics, in spite of my pleading citing all these abuses. Even when I reiterated these abuses in my request for an oral hearing which was denied. I thereby had no opportunity of confronting the Board personally with these foul deeds.

After the Board's decision, we had a year plus of rest from the N.L.R.B. They

then contacted me. Because I would not comply with their unlawful decision, they went ahead with an enforcement proceeding before the Ninth Circuit Court of Appeals.

We pointed out in our brief to the Appeals Court all of the foregoing inequities and harrassments. We also pointed out the fact that the Executive Secretary of the N.L.R.B. CERTIFIED that the "documents annexed hereto constitute a full and accurate transcript of the entire record and proceeding by the said Board." Yet we had to submit eighty some pages of pleadings; both ours and theirs to complete the pleadings and show our side of the case. The N.L.R.B. had presented mostly documents which showed their biased view and eliminated most of our complaints about their deceitful conduct.

In addition, we were later allowed by the appellate panel to submit a large appendix (R1b) that presented the employees'

petitions for decertification to the Board, which the N.L.R.B. in their complaint maintained did not exist. Included in this volume (R1b) was the letter concerning the deceitful quoting of the law and various other letters and documents substantiating my complaints. Some of these documents would have been presented at the trial if my witnesses had been allowed. Others would have been presented to the Board, if they had allowed me the oral hearing requested.

We further brought forth our defence of the charge of bargaining in bad faith. We also brought out the many out of context quoting of cases in their appellate brief. An example is their citing of N.L.R.B. v. Herman Sausage, Inc. 275 F 2d, 229 (5th Cir. 1960) 221, 231, 232. If this case had been quoted more fully, it would have turned the tide of this citation in our direction. The N.L.R.B. attempted

to use it adversely against us by deceitful use of the text.

I would like to point out that the Board attorney made a libelous statement describing me as "disingenuous" in his brief. He did not even know me.

The hearing in the Appellate Court went against me. The judges bowed to the expertise of the Board (which, in this case, would be more properly called the tyranny of the experts). In their Memorandum, The Appeals Court practices some of the same tricks used by the N.L.R.B. in citing cases. Quotations are carefully excerpted to suit their purpose, not allowing the full meaning of the case cited to be revealed. In fact, one of the citations was so far off base as to not apply to the case. This was brought out in our petition for rehearing. Their citation of Golden State Bottling Co. v. N.L.R.B. 414, U.S. 168 (1973) 9th Cir. is one which is about

a back pay issue! The source citation as to N.L.R.B. v. Yama Woodcraft Inc. turns out to be N.L.R.B. v. Vantram Electronic Corp. 580 F2d 921 (1978) 7th Cir. In this case enforcement was denied and it was said that the Board exceeded its remedial powers. This is certainly the decision that should have been reached in our case. But in addition, the Court should have assessed sanctions against the Board and its attorney and awarded us damages for the flagrant treatment we received at the Board's hands.

The one citation they got straight was Universal Camera Corp. v. N.L.R.B. 340 U.S. 474 (1951). In this case the judges held "that where the findings and conclusions are supported by substantial evidence we are not permitted to substitute our judgment for that of the Board." The Appellate Court stops quoting at this

point because this much of the quotation supports their approach to justice. BUT if we continue reading in this case, we find that the Supreme Court's intent was to cause the Appellate Court to look more carefully at the administrative procedures. The Court held on page 490 (5): (My underlining)

> "We conclude, therefore, that the Administrative Procedure Act and the Taft Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeal. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the

> testimony of witnesses or its informed judgment on matters within its special competence or both."

In my petition for rehearing en banc I requested the whole appellate court to take cognizance of this admonition. If the appellate court had not abdicated their conventional judicial function, I would have been granted a rehearing en banc. The capricious and tyrannical prosecution of the N.L.R.B. would have been properly condemned. Both this Court and I would have been spared the necessity of the Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The granting of this Writ is of the greatest importance to the citizenry of the United States in order to uphold the traditions set forth by the founders of this great nation; that the Judicial Branch of the Government shall be the protector of the freedoms envisaged in the Declaration of Independence. Paramount among the many ideas of freedom was the thought of having a system of government that would check the tyranny of the governmental processes. As the writers of the Constitution well understood, the total record of human history contained many instances of tyrannical rule, corrupt governments, and the decay of governments because of a self-serving bureaucracy. They themselves had experienced the tyranny of the English King and his agents.

By renouncing honesty in the use of

power, bureaucracies became tyrannical and attempted to destroy some of the citizenry by championing causes, by use of distorted facts, false pleading, despotic administrators, special courts and lawyers who act for the cause - ethics, the public, and the unfortunate defendant be damned, using all the deceitful tricks of his trade to win the Government's case and cause.

In conclusion I wish to relate a statement I once read, that justice is frequently done when the Government loses a case. The harrassment of us by the N.L.R.B., including the refusal of the Appeals Court to protect our right of fair trial and due process demands that we be granted this Writ of Certiorari. The right of due and fair process required by a citizen when confronted by his Government must be well established in a new decision by the Supreme Court

of the United States - the institution the public respects as the palladian of fairness, truth and justice.

Respectfully submitted,

Mark J. Thomas, Petitioner

Dec. 12, 1980
Dated

PROOF OF SERVICE

I am a citizen of the United States, over eighteen years of age, a resident of Santa Clara County, and not a party to the within action. My business address is 50 Bellevue Avenue, San Jose California 95110. I served three copies of the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by placing said copies in an envelope which was then sealed and postage fully prepaid thereon, and was, on December 12, 1980 deposited in the United States mail at the United States Post Office, 105 N. First Street, San Jose, California to the following persons:

Elliott Moore, Deputy Associate
General Counsel
National Labor Relations Board
1717 Pennsylvania Ave.
Washington, D. C. 20570

Solicitor General
Department of Justice
Washington, D. C. 20530

That there is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury, that the foregoing is true and correct.

December 12, 1980
Dated: December 12, 1980

Suzanne D. Thomas